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SENATE BILL 2843 By
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HOUSE BILL 2720
By Bowers

AN ACT to amend Tennessee Code Annotated, Title 54, and to enact the "Tennessee Minority and Women Business Enterprise Act of 1998".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 54, Chapter 2, is amended by adding Sections 2 through 9 of this act as a new part thereto.

SECTION 2. The title of this act is, and may be cited as the "Tennessee Minority and Women Business Enterprise Act of 1998".

SECTION 3. The purpose of this act is to ensure that the Tennessee department of transportation (TDOT), construction contractors and subcontractors provide equal employment opportunity to minority and female businesses in non-federally funded contracts.

SECTION 5. As used in this act, unless the context otherwise requires:

(1) "Department" means the Tennessee department of transportation (TDOT).

(2) "Disadvantaged Business Enterprise (DBE)" means a small business concern:

(A) which is at least fifty-one percent (51%) owned by one or more socially and economically disadvantaged individuals, or, in the case of a publicly owned business, at least fifty-one percent (51 %) of the stock is owned by one or more socially and economically disadvantaged individuals; and

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(B) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(3) "Minority Business Enterprise (MBE)" means a small business concern:

(A) which is at least fifty-one percent (51 %) owned by one or more members of a minority group specified as socially and economically disadvantaged, or, in the case of a publicly owned business, at least fifty-one percent (51 %) of the stock is owned by members of a minority group specified as socially and economically disadvantaged; and

(B) such enterprise is certified as minority-owned under the rules and regulations of the department.

(4) "Small Business Concern" has the same meaning as the definition contained in Section 3 of the Federal Small Business Act (15 U.S.C. 632), except such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which have average annual gross receipts over the preceding three (3) fiscal years in excess of fourteen million dollars (\$14,000,000) as adjusted by the United States Secretary of Transportation for inflation.

(5) "Socially and Economically Disadvantaged Individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Federal Small Business Act (15 U.S.C. 632).

(6) "Women Business Enterprise (WBE)" means a small business concern:

(A) which is at least fifty-one percent (51%) owned by one or more women, or, in the case of a publicly owned business, at least fifty-one percent (51%) of the stock is owned by women; and

(B) such enterprise is certified as women-owned under the rules and regulations of the department.

SECTION 5. (a) Notwithstanding any law to the contrary, the department of transportation shall establish a goal of awarding not less than ten (10) percent of the annual dollar value of all contracts to qualified minority business enterprises (MBEs) and five (5) percent of the annual dollar value of all contracts to qualified women business enterprises (WBEs).

(b)(1) The minority business councils quarterly shall submit to the department on a quarterly basis a list of qualified MBEs and WBEs based on the uniform certification procedures of the minority business councils. From such list, the department shall certify qualified MBEs and WBEs as eligible for contract awards and participation. There is a rebuttable presumption that MBEs and WBEs submitted by the minority business councils to the department are eligible for certification. However, if the department certifies an MBE or WBE which is not on the list, the minority business councils must confirm that such certified MBEs and WBEs are qualified prior to awarding a contract to such MBEs or WBEs. Nothing in this act shall be construed as limiting certification by the department to the members of the minority business councils.

(2) The criteria for certifying and decertifying DBEs shall be the same as the regulations currently in place, or as amended, for certifying MBEs and WBEs for federally funded contracts.

(c) The department shall submit a written report to the governor and to the general assembly on or before February 15th of each year. The report shall, at a

minimum, provide detailed information which indicates the progress made in achievement of the specific goals established under this section.

(d) The comptroller's office annually shall conduct an audit of the department's compliance with this act.

SECTION 6. In order to achieve the goal stated in this act, the department shall undertake, in addition to the other measures provided herein, the following measures:

(1) Insert within specifications for each contract let through competitive bidding with an estimated value in excess of ten thousand dollars (\$10,000.00) a requirement that the contractor commit to the expenditure of at least ten percent (10%) of the dollar value of the contract with one or more MBEs and at least five percent (5%) of the dollar value with one or more WBEs.

This commitment may be met by:

(A) the contractor's status as an MBE or WBE; or

(B) a joint venture with one or more MBEs or WBEs as prime contractor (to the extent of the MBE or WBE participation in such joint venture); or

(C) subcontracting a portion of the work to one or more MBEs or WBEs;

or

(D) purchasing materials or services for the work from one or more MBEs or WBEs; or

(E) the indirect participation of MBEs or WBEs in other aspects of the contractor's business (but no dollar of such indirect MBE or WBE participation shall be credited more than once against a contractor's MBE or WBE commitment with respect to all contracts of such contractor); or

(F) any combination of the foregoing;

(2) Review each proposed contract modification request that, by itself or aggregated with previous modification requests, increases the contract value by ten

percent (10%) of the initial contract value or fifty thousand dollars (\$50,000.00), whichever is greater, for opportunities to increase participation of MBEs or WBEs already involved in the contract;

(3) Consider the extent of each bidder's commitment to MBE/WBE participation as further evidence of the responsibility of the bidder;

(4) Negotiate with any contractor whose contract is in excess of ten thousand dollars (\$10,000.00) in value and who is not awarded by competitive bidding a commitment, where practicable, to include MBE participation of at least ten percent (10%) and WBE participation of at least five percent (5%) of the dollar value of the contract;

(5) Insert in each contract containing a commitment to MBE and/or WBE participation:

(A) A requirement of periodic reporting by the department to the comptroller's office on all expenditures made to achieve compliance with the foregoing provisions. Such reports shall include the name and business address of each MBE and WBE solicited by the department to work as a contractor or subcontractor on the contract and the responses received by the department to such solicitation, the name and business address of each MBE and WBE actually involved in the contract, a description of the work performed and/or product or service supplied by each such MBE or WBE, the date and amount of each expenditure, and such other information as may assist the comptroller's office in determining the department's compliance with the foregoing provisions, and the status of any MBE or WBE performing any portion of the contract;

(B) Remedies for the department's or a contractor's noncompliance with the commitment to MBE/WBE participation including an agreement to pay damages to the MBEs and WBEs found to be underutilized. The unexcused

reduction of MBE or WBE contract participation in connection with a contract (including any modification thereof) shall entitle the affected MBEs or WBEs to damages pursuant to such agreement. Such provisions shall include an agreement to submit any dispute concerning such damages to binding arbitration by an independent arbitrator, with reasonable expenses, including attorney's fees, being recoverable by a prevailing MBE or WBE. The department shall adopt rules and procedures governing such arbitration.

(C) Uniform provisions permitting the termination of the contract by the department upon the disqualification of the contractor as MBE or WBE, if (i) the contractor's status as MBE or WBE was a factor in the award of the contract; and (ii) such status was misrepresented by the contractor;

(D) Uniform provisions permitting termination of the contract by the department upon the disqualification of any MBE or WBE subcontractor or supplier of goods or services if (i) the subcontractor's or supplier's status as MBE or WBE was a factor in the award of the contract; and (ii) the status of the subcontractor or supplier was misrepresented by the contractor. In the event that the contractor is determined not to have been involved in any misrepresentation of the status of the disqualified subcontractor or supplier, the contractor shall discharge the disqualified subcontractor or supplier and, if possible, identify and engage a qualified MBE or WBE as its replacement; and

(E) Uniform provisions allowing the department and/or the comptroller's office access to the contractor's books and records including, with limitation, payroll records, tax returns and records, and books of account, on five (5) business days' notice, to determine the departmental and contractor compliance with its commitment to MBE/WBE participation and the status of any MBE or WBE.

SECTION 7. (a) It shall be unlawful for a person or entity to:

(1) Knowingly and with intent to defraud, fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain, certification as an MBE or WBE for the purposes of this act.

(2) Willfully and knowingly make a false statement with the intent to defraud, whether by affidavit, report, or other representation, to a state official or employee for the purpose of influencing the certification or denial of certification of any entity as an MBE or WBE.

(3) Willfully and knowingly obstruct, impede, or attempt to obstruct or impede any state official or employee who is investigating the qualifications of a business entity which has requested certification as an MBE or WBE.

(4) Knowingly and willfully with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain, public moneys to which the person is not entitled under this act.

(b) Any person or entity that is found by the department and/or comptroller's office to have violated any of the provisions of subsection (a) is subject to a civil penalty of not more than five thousand dollars (\$5,000) for each such violation.

(c) If a contractor, subcontractor, supplier, subsidiary, or affiliate thereof, has been found by the department and/or the comptroller's office to have violated subsection (a) and that violation occurred within three (3) years of another violation of subsection (a) found by the department and/or the comptroller's office, the department shall prohibit that contractor, subcontractor, supplier, subsidiary, or affiliate thereof, from entering into a state project or state contract and from submitting a bid to a state entity, and from being a subcontractor to a contractor for a state entity and from being a supplier to a state entity.

(d) The provisions of this section shall be administered in accordance with the Uniform Administrative Procedures Act found in Tennessee Code Annotated, Title 4, Chapter 5.

SECTION 8. (a) Annually, the department shall provide to minority and female businesses which have bid on contracts during the fiscal year, a summary on major policy manuals or important changes in contracting procedures.

(b) The department shall provide the same summary of key policies to parties requesting applications for certification as an MBE or WBE;

(c) The department shall provide semi-annual workshops for newly certified businesses to explain contracting and purchasing processes.

(d) The department shall provide a summary of key policies regarding the implementation of MBE and WBE percentage goals established in Section 5 of this act to departments and persons responsible for contracting activities.

(e) The department shall provide technical and managerial aid in:

- (1) Reading plans and specifications;
- (2) Identifying jobs comparable to the MBE's or WBE's work specialty;
- (3) Putting together the bid package;
- (4) Scheduling;
- (5) Computing take-off estimates;
- (6) Marketing;
- (7) Setting up books to track revenues and expenses;
- (8) Interpreting financial statements; and
- (9) Completing applications for loans or bonding.

(f) The department shall provide job listings and listings of the potential prime bidders to MBEs and WBEs.

(g) The department shall hold pre-bid conferences at least six (6) times a year in order to bring together MBEs and WBEs, the department and prime contractors.

SECTION 9. The commissioner of transportation is authorized to promulgate rules and regulations to effectuate the purposes of this act. All such rules and regulations shall be promulgated in accordance with the provisions of Tennessee Code Annotated, Title 4, Chapter 5.

SECTION 10. The provisions of this act are declared to be remedial in nature and all provisions of this act shall be liberally construed to effectuate its purposes.

SECTION 11. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 12. This act shall take effect upon becoming a law, the public welfare requiring it.